Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of	)	
the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

To: The Commission

OPPOSITION OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS TO PETITIONS FOR RECONSIDERATION

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To: The Commission

Pursuant to 47 C.F.R. § 1.429, the National Association of Telecommunications Officers and Advisors (NATOA) hereby opposes certain Petitions for Reconsideration filed in this proceeding, as detailed below.

The Commission's order on open video systems ("OVS")[1] is in many respects misguided. In addition, however, certain arguments advanced in the petitions for reconsideration filed by the telephone and cable industries would, if adopted, further diminish any chance that the Commission's implementation of OVS could fulfill what Congress intended. This Opposition briefly addresses some of the most critical errors, without attempting to

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[1] Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, Second Report and Order (released June 3, 1996) ("Order").

canvass all the objectionable suggestions in the various reconsideration petitions.[2]

I. THE LECs' ATTEMPT TO FURTHER REDUCE THE FEE IN LIEU WOULD DEFEAT CONGRESSIONAL INTENT AND EMPHASIZE THE FAILURE OF THE FEE IN LIEU TO PROVIDE JUST COMPENSATION FOR RIGHT-OF-WAY USE.

The OVS operator's fee in lieu of the cable franchise fee, as defined in the Order, fails to provide just compensation for an OVS operator's use of the public rights-of-way.[3] Two petitions by local exchange carriers ("LECs"), however, would seek to reduce the fee in lieu still further. Bell Atlantic et

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[2]Over and above the specific points addressed below, the industries' petitions are noteworthy for what they reveal about the industries' real goals. For example, the very curious discussion of "co-packaging" by the LECs, Bell Atlantic Petition at 7, lays bare the fact that the LECs do not intend to promote, or allow, intra-system competition among program packagers at all: rather, the LECs apparently envision a cozy arrangement in which nominally unaffiliated video programming providers simply "cooperate" with the operator in offering joint program packages — in other words, a cable system.

[3]See Petition for Reconsideration of the National League of Cities; the United States Conference of Mayors; the National Association of Counties; Montgomery County, Maryland; and the City of Los Angeles, California at 4-12 ("NLC Petition"). See also letter from Darrel Drown, Chairman, Howard County Council, to Reed Hundt, dated June 26, 1996; Petition for Reconsideration of the City of Indianapolis, Indiana at 1 (July 1, 1996); Petition for Reconsideration, Second Report and Order, Open Video Systems, submitted by Metropolitan Dade County at 2-3 (July 3, 1996); Petition for Reconsideration, Municipal Administrative Services, Inc., et al. at 2-6 (July 3, 1996).

With respect to local governments' rights under state law to franchise or otherwise authorize use of their public rights-of-way, it is noteworthy that the LECs themselves, when it is to their advantage, argue correctly that the scope of any existing right-of-way authority they may have been granted "is a matter between the LEC and the local government." Bell Atlantic Petition at 10.

al. and NYNEX argue that LEC affiliate revenues should be excluded from fee in lieu calculations.[4] Bell Atlantic et al., in addition, argue that even carriage revenues received by the OVS operator should be excluded.[5] Such exclusions would defeat the entire purpose of the statutory fee in lieu provision and exacerbate the Fifth Amendment infirmities of the Order by further reducing the compensation that the Order claims (incorrectly) is sufficient to carry out a taking of local government property.

The only argument the LECs offer for excluding affiliate revenues is that the statute does not explicitly refer to affiliates in the fee in lieu provision.[6] But this argument cannot be squared with Congress' intent as reflected in the statute. The fee in lieu provision is clearly intended to require an OVS operator to pay a fee that matches that of a comparable cable operator.[7] But excluding affiliate revenues would allow an OVS operator to pay far less than a cable operator by the simple expedient of creating a corporate subsidiary.

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[4]Petition of the Joint Parties for Reconsideration of the Second Report and Order at 4-5 (July 5, 1996) ("Bell Atlantic Petition"); NYNEX Petition for Reconsideration at 3-9 (July 5, 1996) ("NYNEX Petition"). NYNEX also appears to believe that advertising revenues should be excluded from the fee base. Id. at 5 n.5. The Commission should clarify that advertising revenues are included.

[5]Bell Atlantic Petition at 4-5.

[6]See Telecommunications Act of 1996 ("1996 Act"), sec. 302(a) (adding § 653(c)(2)(B)).

[7]Even NYNEX acknowledges that the intent of Congress was to "ensure parity among video providers." NYNEX Petition at 8.

Moreover, the LECs' proposed scheme would create a pointless and meaningless distinction between an OVS operator that programs its own system and one that uses an affiliate to do the same thing. Congress cannot have intended to sanction such a flat evasion of the fee provision.[8]

Bell Atlantic's additional attempt to exclude the OVS operator's carriage revenues renders its evasion scheme comically transparent. If an affiliate handles the operator's own programming, virtually all the OVS operator's direct revenues will consist of carriage revenues. Thus, if both affiliate revenues and carriage revenues were excluded, what would be left? Apparently Bell Atlantic et al. wish the Commission to believe that the fee in lieu should be paid only on "revenues the OVS operator receives from subscribers"[9] — that is, the nominal hookup fee an operator may choose to charge an individual subscriber.

The Commission's rules, of course, do not even require such a hookup fee — the OVS operator could recover system costs entirely through carriage revenues, leaving little or no revenue on which to pay the fee in lieu. That would hardly make the fee in lieu match what the cable operator pays. In short, Bell Atlantic's interpretation would make the fee in lieu a joke, and

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[8]The extraordinary suggestion of NYNEX that it should be allowed to recover the fee in lieu from unaffiliated programmers, NYNEX Petition at 8 n.11, reveals the lengths to which the LECs are willing to go to evade the intent of the statute, and should be rejected out of hand.

[9]Bell Atlantic Petition at 5.

strip away any possible remaining pretense that it could provide just compensation for an OVS operator's right-of-way use.

In fact, the LECs' argument as to carriage revenues is specious. A cable operator's revenues derived from cable service under Section 622 include both implicit components of the subscriber's payment — the programming charge component and the carriage or transport charge component — as well as other non-subscriber revenues that would not exist but for the cable service, such as revenues from advertising on cable channels. An OVS operator's carriage revenues represent one of those components — the carriage or transport charge. Thus, the OVS operator's carriage revenues represent a part (though only a part) of the revenues derived from the cable service provided over the OVS and fall clearly within the statutory language.

II. THE LECs' ATTEMPT TO AVOID ADDRESSING LOCAL NEEDS AND INTERESTS IN ESTABLISHING PEG OBLIGATIONS WOULD DEFEAT THE PURPOSE OF SUCH OBLIGATIONS.

The Order's provisions regarding support for public, educational, and governmental ("PEG") access offer an OVS operator two options: comply with the statutory requirement by providing exactly the same support as the incumbent cable operator, or negotiate with the local franchising authority to arrange for obligations that may be different from, but no greater or lesser than, those of the cable operator.[10] Not

[10]As noted in NLC Petition at 15-16, Petition for Reconsideration and Clarification, Alliance for Community Media et al. at 7 (July 5, 1996); and Petition for Reconsideration of

satisfied with this flexibility, however, the LECs seek still another option. Their suggestion is apparently that the OVS operator be permitted to impose its own conception of equivalent support unilaterally, forcing the local franchising authority to challenge the operator's unilateral decision in a complaint to the Commission or to an arbitrator.[11]

Our comments in this proceeding have shown that because PEG obligations are designed to serve local needs and interests, local communities must play a proactive role in any arrangements that differ from the cable operator's obligations, which have already been established to fulfill individual local needs and interests.[12] Thus, the LECs' request for authority to make unilateral changes in those local obligations undermines the entire purpose of the OVS PEG provisions.

Moreover, the reasons proffered by the LECs for their unwillingness to negotiate PEG obligations are obscure and unconvincing at best. Local franchising authorities will consider negotiated alternatives to the exact provisions of the cable operator's franchise wherever such equivalent, but different, obligations would be more reasonable than exact

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Michigan, Illinois and Texas Communities at 10-20 (July 3, 1996), however, the "match or negotiate" requirement must also extend to institutional network obligations.

[11] Bell Atlantic Petition at 14-15.

[12] See Comments of the National League of Cities et al. at 28-41 (April 1, 1996) ("NLC Comments"); Reply Comments of the National League of Cities et al. at 28-32 (April 11, 1996) ("NLC Reply Comments").

duplication. The LECs have provided no support for their claim that local franchising authorities could, or would, somehow attempt to "extract other concessions" in such a negotiation.[13] And the LECs' claims of alleged technical difficulties in meeting individual community needs, as cable operators have done for years, have been refuted in prior comments.[14] Finally, LECs' reference to "sharing of costs" appears to confuse interconnection and PEG program carriage with obligations regarding PEG services, facilities, and equipment.[15]

III. COMCAST'S ATTEMPT TO USE THE OVS RULES TO EVADE ITS CONTRACTUAL OBLIGATIONS DEMONSTRATES THE IMPROPRIETY OF ALLOWING EXISTING CABLE SYSTEMS TO CONVERT TO OVS.

The Order provides that, assuming cable conversions to OVS are permissible at all under the statute (and as elsewhere pointed out, they should not be[16]), such conversions cannot allow a cable operator to abrogate its existing contractual franchise obligations.[17] Comcast, however, complains that this restriction renders the OVS option "meaningless" for a cable operator. Comcast asks the Commission to excuse cable operators

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[13] Bell Atlantic Petition at 13-14. And even if local franchising authorities were to do so, one wonders why the LEC could not file a complaint at the Commission.

[14] Compare Bell Atlantic Petition at 14-15 with NLC Comments at 40-41, NLC Reply Comments at 31-32.

[15] Bell Atlantic Petition at 13.

[16] See NLC Comments at 46-50; NLC Reply Comments at 32-37.

[17] Order at ¶ 26.

from standing by their contractual franchise commitments by declaring franchise requirements "unenforceable" upon a cable operator's unilateral decision to convert to OVS.[18]

Comcast's bold demand for Commission help in reneging on its contractual commitments reveals what cable operators are really seeking from OVS: a way of violating their franchises with impunity. It also demonstrates the fundamental error of the Commission's underlying decision in the Order to allow cable operator conversions to OVS at all.[19] A proper reading of the statute, holding that only LECs can be OVS operators and that existing cable operators cannot become OVS in their cable service areas, would avoid the slippery slope onto which Comcast urges the Commission to step.[20]

It would, of course, be unprincipled for the Commission to exempt a cable operator from its existing contractual franchise obligations. More fundamentally, such a result would constitute yet another taking of local government property by the Commission, resulting in still greater costs to federal taxpayers.[21] It is disingenuous for Comcast to claim that its suggestion is pro-competitive, when it really represents a plea

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[18]Petition for Reconsideration, Comcast Cable Communications, Inc., at 3-8 (July 5, 1996) ("Comcast Petition").

[19]See NLC Petition at 16-19.

[20]Comcast Petition at 7.

[21]See, e.g., United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 18 n.16 (1977), citing Contributors to Pennsylvania Hospital v. Philadelphia, 245 U.S. 20 (1917); Lynch v. U.S., 292 U.S. 571 (1934).

for federal taxpayers to subsidize cable operators in abandoning their contracts with local communities.

IV. CONCLUSION

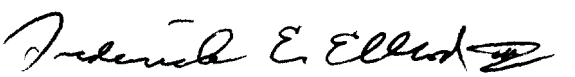
In summary, on reconsideration the Commission should:

- make clear that Commission approval of an OVS certification confers no independent right on the OVS operator to occupy local public rights-of-way;
- decline to reduce any further the basis of the fee in lieu;
- require OVS operators to match or negotiate PEG obligations no greater or lesser than those of the cable operator, including institutional network obligations, making clear that the OVS operator's obligation to match is in addition to the cable operator's existing obligations;
- allow only LECs to become OVS operators as the statute says, making clear that cable operators cannot convert to OVS in violation of their existing contract obligations or in any area where they already provide cable service;

- revise its rules regarding discrimination, rates, and certification to ensure truly open access to an OVS.

Respectfully submitted,

THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS

By 

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